Supreme Court, U.S.
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No. 89-1124

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In The

Supreme Court of the United States

October Term, 1989

AMERICAN BOOKSELLERS ASSOCIATION, INC., ASSOCIATION OF AMERICAN PUBLISHERS, INC., COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATION, INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, NATIONAL ASSOCIATION OF COLLEGE STORES, INC., BOOKS UNLIMITED, INC., AND AMPERSAND BOOKS

Petitioners,

v.

COMMONWEALTH OF VIRGINIA

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

CAN A LOSING PLAINTIFF OBTAIN ATTORNEY FEES AS A "PREVAILING PARTY" UNDER 42 U.S.C. § 1988 WHEN HIS ARGUMENTS WERE REJECTED *IN TOTO* AND HE OBTAINED NO RELIEF FROM HIS LAWSUIT?

REASON FOR DENYING THE WRIT

The American Booksellers Association and several other parties ("plaintiffs") seek certiorari review of a judgment of the United States Court of Appeals for the Fourth Circuit denying them attorney fees from the Commonwealth of Virginia under 42 U.S.C. § 1988. Their theory is that they should be considered "prevailing parties" within "the spirit" of § 1988 because, but for their meritless lawsuit, the Supreme Court of Virginia would not have had the chance to hold that plaintiffs' proffered construction of the 1985 amendment to § 18.2-391(a) of the Code of Virginia and its alleged impact on them was totally wrong. Their argument is frivolous on its face.

In 1985, plaintiffs launched a pre-enforcement facial attack under 42 U.S.C. § 1983 and the Declaratory Judgment Act against a newly-enacted and never construed amendment to Virginia Code § 18.2-391(a) concerning the dissemination of pornography to children. They prevailed in the district court and the court of appeals where, as this Court has noted previously, the parties painted "strikingly different" pictures of the amendment: "[Plaintiffs] see the statute as a broad enactment, potentially applying to a large number of works"; Virginia, on the other hand, "argues that the statute's coverage is much narrower than plaintiffs allege. . . . It contends that the statute covers only a very few 'borderline' obscene works, and none of the exhibits introduced by plaintiffs." *Virginia v. American Booksellers Ass'n, Inc.*, 108 S.Ct. 636, 643 (1988).

This Court, though, rejected the findings of the district court and court of appeals: "This Court rarely reviews a construction of a state law agreed upon by the two lower federal courts. * * * However, this case presents the rare situation in which we cannot rely on the construction and findings below." 108 S.Ct. at 643 (citations omitted). Because the Court could not accept as binding on state courts and local prosecutors the narrow interpretation of the statute proffered by the Attorney General of Virginia, however, it certified two questions to the Supreme Court of Virginia concerning the amendment's scope and what compliance with it would require. *Id.*

The "strikingly different" views of the statute asserted by the parties did not change one whit in the Supreme Court of Virginia: plaintiffs continued to ascribe to the amendment the broadest possible meaning and application, while Virginia continued to argue as it had for several years that the provision was extremely narrow in scope and application. Rejecting *in toto* plaintiffs' expansive reading of the statute, the Supreme Court of Virginia held that the Attorney General's long-stated narrow view of the provisions' scope and compliance mechanism correctly stated the law. *Commonwealth v. American Booksellers Assoc.*, 236 Va. 168, 372 S.E.2d 618 (1988).

This Court thereafter vacated the decision of the Fourth Circuit and remanded the case for reconsideration in light of the state court's construction of the statute. *Virginia v. American Booksellers Association*, 109 S.Ct. 254 (1988). Plaintiffs even then continued to contend strenuously on remand that the amendment was "unconstitutionally vague even as interpreted by the Supreme Court

of Virginia." *American Booksellers Ass'n Inc. v. Commonwealth of Virginia*, 882 F.2d 125, 127 (4th Cir. August 16, 1989), *rehearing and rehearing en banc denied* (October 13, 1989). The court of appeals, however, rejected their contention and found the State's narrow view of the amendment as adopted by the Virginia Supreme Court to be constitutional and, accordingly, denied attorney fees to plaintiffs. *Id.* at 127-28.

Incredibly, plaintiffs now contend that the denial of attorney fees by the court of appeals conflicts with "the spirit" of 42 U.S.C. § 1988 because the Supreme Court of Virginia would not have had the opportunity to "authoritatively narrow the scope of the amendment" had plaintiffs not brought their lawsuit. (PL. BR. at 13). This argument, of course, ignores the fact that the interpretation of the statute by the Supreme Court of Virginia was the very one plaintiffs had fought *against* tooth and nail for over four years. And this claim ignores further that the Virginia Supreme Court did not "narrow the scope of the amendment" because that court did not give the provision a new construction; the amendment had never been construed previously by a Virginia court, and the construction given it by the Supreme Court of Virginia was exactly the same meaning the provision had had since its enactment.

This Court has held that a plaintiff cannot be a prevailing party for purposes of § 1988 attorneys' fee award unless he receives "at least some relief on the merits of his claim." *Hewitt v. Helms*, 482 U.S. 755, 760 (1987). The plaintiffs here received *no* relief from their lawsuit. The only thing they received was a finding that the 1985 amendment to Virginia Code § 18.2-391(a) meant exactly

what Virginia had said it meant from day one of the litigation in this case. *Contrast Texas State Teachers' Association v. Garland Independent School District*, 109 S.Ct. 1486 (1989) (plaintiff prevailing on significant, but not central, issue and obtaining some relief sought can be "prevailing party"); *see also Rhodes v. Stewart*, 109 S.Ct. 202 (1988) (plaintiff obtaining declaratory judgment not "prevailing party" if judgment does not affect defendant's behavior towards that plaintiff).

CONCLUSION

Plaintiffs' argument is akin to a prospector drilling for oil against all advice, hitting a "dry hole," and then claiming a finder's fee for proving that there was nothing there to begin with. To allow them to obtain § 1988 attorney fees as a "prevailing party" under the circumstances of this case would guarantee that every litigant who files a frivolous lawsuit under § 1983 claiming that a statute has an unconstitutional impact on him would be entitled to attorney fees – even when the court, as here, rejects every argument he makes and holds the impact claimed by him to be totally nonexistent. Plaintiffs concede implicitly that their claim is not within the letter of

§ 1988, and it just as surely is not within "the spirit" of that provision either. This Court should deny the plaintiffs' frivolous petition for a writ of certiorari.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA
Respondent herein

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